BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ELENA D. KNOBLAUCH Claimant	)	
V.	)	
STAPLES PRINTING LABEL COMPANY Respondent	)	Docket No. 1,056,580
AND	)	
INDEMNITY INS. CO. OF N. AMERICA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 29, 2016, Award entered by Administrative Law Judge (ALJ) Ali Marchant. The Board heard oral argument on May 20, 2016. Kenton D. Wirth of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent.

The ALJ found claimant sustained a 13 percent permanent partial impairment to the body as a whole as a result of her April 9, 2010, work-related accident. The ALJ determined claimant has a 22.42 percent work disability award through January 13, 2015, and a 62 percent work disability thereafter.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues the credible medical evidence proves claimant sustained only a five percent functional impairment to her left shoulder. Further, respondent maintains claimant has no work-related task loss because the only credible medical opinion did not assign permanent restrictions.

Claimant argues she sustained permanent injury to both her neck and left shoulder as a result of her April 2010 work injuries. Claimant contends the ALJ's Award should be affirmed.

The sole issue for the Board's review is: what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant began employment with respondent in 2009 as a security rewinder. In this position, claimant worked with a machine to splice a large master roll of pharmaceutical labels into smaller rolls. Claimant testified she repeatedly used her arms, elbows, and hands to perform her job because approximately once per hour she changed the master roll. Claimant explained she needed a step stool to reach parts of the machine, causing her to reach overhead, and that the job required repeated movements and speed with her hands and neck.

On April 9, 2010,[1] claimant was loading a master roll of labels when she felt a sharp pain in the top of her left shoulder. Claimant testified she never previously felt that type of sensation in her left shoulder, nor did she have problems with her left shoulder or neck prior to that date. Claimant explained her pain initially subsided until the following morning, when she could not move her left hand without pain in her shoulder. Claimant returned to work following the weekend and informed her supervisor of the accident.

Respondent sent claimant to the company doctor, where she received conservative treatment, including injections and a sling for her left arm. Claimant was eventually referred to physical therapy in June or July 2010. Claimant testified she told the therapist her neck and low back hurt every time her left shoulder hurt. She stated she also reported neck symptoms to her personal physician on September 30, 2010.

Claimant began treating with orthopedic surgeon Dr. John Babb in October 2010. Claimant completed a pain diagram on October 11, 2010, on which she indicated sharp, stabbing pain in her left arm, left back, and neck.[2] Dr. Babb ordered a left shoulder MRI, which revealed "mild supraspinatus and infraspinatus peritendinitis without a cuff tear, and some outlet stenosis secondary to acromial tilt."[3] Dr. Babb diagnosed left shoulder cuff tendonitis and recommended conservative treatment.

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[1] Claimant initially claimed an accident date of April 13, 2010.

[2] See Babb Depo., Cl. Ex. A at 1.

[3] Babb Depo. at 7.

Claimant returned to Dr. Babb on November 29, 2010, at which time she indicated she was not improved. Dr. Babb performed a left shoulder surgery on December 16, 2010. Claimant followed up with Dr. Babb after surgery with additional physical therapy and reported her pain was improving. Dr. Babb testified:

> [Claimant] reported she was doing well [on February 23, 2011]. On exam she had near full range of motion, good strength, neurovascularly intact, no swelling, all the incisions were healed. She was okay with being released that date. She returned to work without restrictions as of 2/23/2011. Was placed at maximum medical improvement.[4]

Using the AMA *Guides*,[5] Dr. Babb determined claimant sustained a five percent impairment to the left upper extremity based upon her surgery.

Claimant returned to Dr. Babb on April 26, 2011, with complaints of itchiness in her right shoulder and returning pain in her left shoulder. Claimant was prescribed cortisone cream for the right shoulder and told to resume the home exercise program as taught by the physical therapist. Dr. Babb again saw claimant on June 15, 2011, for left shoulder pain. Dr. Babb noted claimant had some positive impingement signs during the examination and recommended a cortisone shot and anti-inflammatory medication. Dr. Babb did not assign work restrictions and testified he did not provide any treatment for claimant's neck.

Dr. Xavier Ng performed a court-ordered independent medical evaluation (IME) on February 17, 2012. Claimant complained of pain in her neck and left shoulder. Dr. Ng reviewed claimant's medical records, history, and performed a physical examination. He provided the following assessment:

> 1. Work injury on 04/13/2010.
> 2. Left shoulder rotator cuff syndrome with impingement and AC joint arthritis.
> 3. Status post left shoulder diagnostic arthroscopy with subacromial decompression with limited acromioplasty and Mumford procedure on 12/16/2010.
> 4. Myofascial pain of the cervical and trapezius region especially on the left.
> 5. Insomnia.[6]

Dr. Ng concluded claimant would benefit from additional physical therapy and medication for her myofascial pain in the trapezius and cervical regions. Dr. Ng wrote, "In my opinion her current complaints of pain in neck and shoulder are a result of her work

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[4] *Id*. at 11.

[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[6] Ng IME (Feb. 17, 2012) at 3.

injury on 04/13/2010."[7] Dr. Ng provided claimant with authorized pain management treatment. He considered her to be at maximum medical improvement (MMI) prior to the end of 2012 and imposed permanent lifting restrictions.

Court-ordered physician Dr. David Harris provided an IME on March 18, 2013, to determine whether claimant required additional treatment. After a review of claimant's history, medical records, and performing a physical examination, Dr. Harris concluded the pain management provided by Dr. Ng was appropriate. Claimant complained to Dr. Harris that her pain had changed from sharp and stabbing to burning. Dr. Harris noted his concerns regarding this change and recommended a trial of nerve stabilizer medication, antidepressants, muscle relaxers, and possible nerve release physical therapy. Dr. Harris indicated claimant could return to MMI after completing this course of treatment. Following the IME, Dr. Harris was authorized as claimant's treating physician. Claimant treated with Dr. Harris until he relocated his practice in December 2014.

Claimant's counsel referred her to board certified orthopedic surgeon Dr. C. Reiff Brown on March 10, 2014. Claimant complained of sharp, constant pain in her left shoulder, worsened with activity, and loss of range of motion in her neck. Dr. Brown reviewed claimant's medical history, available records, and performed a physical examination. He concluded:

> [Claimant] has rotator cuff injury and postoperative symptoms have continued. This operative procedure included a subacromial decompression and excisional arthroplasty of the left clavicle. She also as a result of this injury developed a myofascial pain syndrome involving musculature of the clavicle, involving musculature of the scapula including upper trapezius, supra and infraspinatus.[8]
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> . . .
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> The neck injury can be caused by the sprain or strain that might occur – might have occurred as a result of the injury itself. But I believe that more likely there was extension of muscle spasm from the shoulder into the upper trapezius and then into the low cervical paraspinal [*sic*] musculature on the left. This extension of muscle spasm caused a change in alignment of the cervical spine which resulted in strain and sprain of the various cervical ligaments, facet joints, et cetera.[9]

Dr. Brown imposed permanent restrictions:

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[7] *Id*.

[8] Brown Depo. at 8.

[9] *Id*. at 12.

> She will have to permanently avoid frequent use of the hands above chest level, frequent reach away from the body more than 18 inches. No lifting should be done with either hand above chest level. She should avoid work that involves frequent flexion/extension and rotation of the cervical spine greater than 30 degrees. Her present medication will need to be continued indefinitely.[10]

Using the AMA *Guides*, Dr. Brown opined claimant sustained a combined 19 percent permanent partial impairment to the body as a whole as a result of the April 2010 work-related accident. He explained:

> The range of motion tables on pages 43, 44, 45 of the Fourth Edition of the Guides to the Evaluation of Permanent Impairment would allow her a 7 percent permanent partial impairment of function of the left upper extremity based on her loss of range of motion of the left shoulder. Table 27 on page 61 allowed her an additional 10 percent left upper extremity impairment on the basis of her excisional arthroplasty. And I felt that she had an additional 5 percent whole body impairment based on the DRE cervicothoracic category II for the myofascial pain syndrome. There was an additional 5 percent whole body impairment based on the DRE cervicothoracic category II relative to her cervical dysfunction.[11]

Dr. Brown noted the AMA *Guides* do not specifically provide for myofascial pain; however, the AMA *Guides* indicate an examiner should provide, if necessary, a rating for an additional symptom complex. Dr. Brown testified, "[Myofascial pain syndrome] is a clinical entity that [claimant] has which is bothersome enough to her that it deserves a rating."[12]

Court-appointed neurosurgeon Dr. Paul Stein examined claimant on July 15, 2014, for IME purposes. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Stein concluded:

> [Claimant] sustained soft tissue injury around the left shoulder girdle from frequent and repetitive activity. She also developed soft tissue sprain extending into the left side of the neck and upper back with more recent onset of some mild right shoulder soft tissue discomfort. No true intra-articular injury has been documented to the left shoulder. The records strongly suggest that the primary pathology is soft tissue strain/sprain from the repetitive activity. The claimant is at maximum medical improvement but, despite some restrictions, continues to do frequently repetitive work activity on a machine. This activity continues to aggravate the soft tissue

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[10] *Id*., Ex. 2 at 3.

[11] Brown Depo. at 8-9.

[12] *Id*. at 23.

> problems. The best long-term treatment would be to discontinue such repetitive work activity.[13]

Using the AMA *Guides*, Dr. Stein determined claimant sustained a combined 13 percent impairment to the body as a whole. He indicated a 10 percent impairment for the clavicle excision and a 3 percent impairment for decreased motion for a combined 8 percent whole person impairment related to claimant's left shoulder. Dr. Stein opined claimant sustained a 5 percent whole body impairment under DRE Cervicothoracic Category II related to claimant's left-sided cervical and upper thoracic soft tissue complaints. Dr. Stein noted there was no indication of any preexisting functional impairment.

Dr. Stein assigned permanent work restrictions:

> 1. Minimal activity with either hand above shoulder level or either arm fully outstretched. 2. Avoid repetitive extension and rotation of the neck. 3. Lifting with the left hand should be limited to very occasional 15-pounds up to chest level and occasional 5-pounds up to chest level.[14]

Dr. Babb again examined claimant on August 31, 2015, at respondent's request. Claimant's primary complaints were left shoulder pain and continued neck pain. Dr. Babb reviewed claimant's updated history and medical records and performed a physical examination. He determined claimant had myofascial neck pain and was status post arthroscopy of the left shoulder. Dr. Babb opined claimant's functional impairment remained unchanged from the five percent he originally indicated. Dr. Babb noted claimant's myofascial pain was not related to her work:

> More likely than not, [claimant's] current myofascial neck pain going down into the left trapezius is related to her chronic pain syndrome and not causally related to her 2010 work-related injury. Patient does have a history of fibromyalgia and chronic pain syndrome, and more likely than not, her work injury may have aggravated this.[15]

Dr. Babb testified claimant does not require future medical treatment related to the 2010 work injury, nor does she require permanent work restrictions.

Claimant continued working for respondent as a security rewinder following the April 9, 2010, injury, though respondent accommodated the position to comply with claimant's

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[13] Stein IME (July 15, 2014) at 8.

[14] *Id.* at 9.

[15] Babb Depo., Ex. 2 at 7.

lifting restrictions. Claimant testified she continued to perform the repetitive activities related to her position until January 13, 2015, her last day worked. Claimant explained respondent will not allow her to work while she is taking narcotic pain medication. Claimant has not worked nor earned wages since leaving respondent.

Vocational rehabilitation consultant Karen Terrill interviewed claimant on June 17, 2015, at claimant's counsel's request. She again met with claimant via telephone on August 31, 2015. Ms. Terrill generated a list of the tasks claimant performed in the 15-year period prior to April 2010. Dr. Brown reviewed the task list produced by Ms. Terrill. Of the 25 unduplicated tasks on the list, Dr. Brown opined claimant could no longer perform 12, for a 48 percent task loss.

Vocational rehabilitation consultant Steve Benjamin interviewed claimant on September 9, 2015, at respondent's request. Mr. Benjamin also reviewed claimant's 15-year work history and produced a report listing 18 unduplicated tasks performed in that period. Dr. Babb reviewed the task list generated by Mr. Benjamin and opined claimant could perform all tasks, resulting in a zero percent task loss.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-510e(a) states, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2009 Supp. 44-501(a) states, in part:

> In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2009 Supp. 44-508(g) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

ANALYSIS

Respondent stated at oral argument that the primary issue is the ALJ's reliance on Dr. Stein and not Dr. Babb. Dr. Babb rated only claimant's shoulder. Drs. Stein and Brown included her shoulder and cervical spine in their assessments of impairment. Respondent argues claimant's cervical fibromyalgia is preexisting and was not aggravated, accelerated or intensified by the work-related injury.

Claimant's injury occurred prior to the 2011 changes to the Act. The Court of Appeals, addressing workers with preexisting conditions, wrote:

> The Kansas Supreme Court has held that when a worker with a preexisting condition sustains a subsequent work-related injury that aggravates, accelerates, or intensifies his or her condition, resulting in disability, he or she is entitled to be fully compensated for the resulting disability. *Baxter v. L.T. Walls Constr. Co.,* 241 Kan. 588, 591, 738 P.2d 445 (1987). The test is not whether the injury causes the condition, but whether the injury aggravates or accelerates the condition. *Claphan v. Great Bend Manor*, 5 Kan.App.2d 47, 49, 611 P.2d 180, *rev. denied* 228 Kan. 806 (1980). Where a preexisting condition is aggravated by an accidental injury arising out of employment, a claimant is entitled to compensation for the entire disability without apportionment. 5 Kan.App.2d at 51.[16]

In the pain drawing prepared prior to her October 11, 2010, appointment with Dr. Babb, claimant noted stabbing/sharp pain in the back side of her neck down her left arm. Dr. Babb testified he did not document the neck pain in his clinical notes, but acknowledged, when asked, that claimant noted neck pain on the drawing.[17] As the ALJ pointed out, Dr. Babb agreed that when someone hurts a shoulder it is very common to develop neck pain.[18] In his August 31, 2015, examination report, Dr. Babb wrote the work injury may have aggravated claimant's cervical fibromyalgia.[19]

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[16] *Poff v. IBP, Inc.,* 33 Kan. App. 2d 700, 709, 106 P.3d 1152 (2005).

[17] See Babb Depo. at 23.

[18] See *id*. at 26.

[19] See *id*., Ex. 2 at 7.

Dr. Brown opined claimant's work injury was the prevailing factor causing her neck condition. Dr. Brown was fairly specific when he testified about the mechanism of injury. Dr. Brown testified most likely there was extension of muscle spasm from the shoulder into the upper trapezius and then into the low cervical paraspinal muscles causing a change in alignment of the cervical spine.[20]

In his February 17, 2012, court-ordered IME report, Dr. Ng diagnosed myofascial pain of the cervical and trapezius region. Dr. Ng opined claimant's neck pain was the result of her work injury of April 13, 2010. Dr. Stein, in his July 15, 2014, court-ordered examination report, noted claimant developed soft tissue sprain extending into the left side of the neck related to repetitive activity, which is consistent with the opinion of Dr. Brown.

The Board agrees with the ALJ's finding that the weight of the evidence supports claimant's cervical spine condition is related to her work-related injury. In so finding, claimant's cervical condition must be included in claimant's total functional impairment.

The ALJ adopted Dr. Stein's opinion that claimant suffered a 13 percent whole body impairment, including the left shoulder. The Board agrees with the ALJ's finding. Dr. Stein assessed a 5 percent impairment under DRE Category II for cervical and upper thoracic soft tissue complaint. Dr. Brown utilized DRE Category II twice, once for myofascial pain and also for cervical dysfunction. Dr. Brown testified he placed claimant's myofascial pain in the DRE Category II "for lack of any other place to get it . . . ."[21] Dr. Brown's opinion appears to be duplicative, providing two impairment ratings for one condition.

Regarding claimant's left shoulder impairment, the Board agrees with the ALJ's decision to adopt Dr. Stein's rating of 13 percent to the left upper extremity. Dr. Babb assessed a 5 percent impairment to the left upper extremity. Dr. Brown assigned a 16 percent impairment to the left shoulder. Dr. Stein's neutral opinion is reasonable and is adopted by the Board.

Respondent raised the issue of work disability at oral argument before the Board. In its brief, respondent argues, in the event the Board finds claimant suffers a whole body injury, claimant has only a one percent wage loss based upon Dr. Babb's restrictions and Mr. Benjamin's opinions regarding wage earning capacity. Respondent's argument is rejected. As this injury occurred in 2010, claimant's actual post-injury wages control the extent of wage loss.[22] Both Drs. Stein and Brown agree claimant requires permanent restrictions as a result of her work-related injury. Dr. Babb releasing claimant to return to

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[20] See Brown Depo. at 12.

[21] *Id*. at 22.

[22] See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

work without restrictions is unreasonable and goes against the weight of the evidence. The ALJ's findings and conclusions regarding work disability are adopted by the Board.

CONCLUSION

Claimant has sustained the burden of proving she suffers a 13 percent whole body impairment as a result of her injury by accident while working for respondent. Claimant suffers a 62 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Ali Marchant dated January 29, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2016.

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BOARD MEMBER

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BOARD MEMBER

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Hon. Ali Marchant, Administrative Law Judge